Office Supreme Court U. S.
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APR 24 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1333.

EX PARTE: IN THE MATTER OF FRANCESCA L. DE MARTIN, PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

GEORGE D. COLLINS,
Counsel for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

IN RE APPLICATION OF FRANCESCA L. DE MARTIN FOR A WRIT OF CERTIORARI.

PETITION.

To the Honorable the Supreme Court of the United States of America:

The petition of Francesca L. de Martin respectfully shows to this honorable Court that she is a citizen of Mexico and a resident of the northern district of California.

1. That heretofore, on the 16th day of September, 1890, your petitioner, being then a citizen of Mexico and a resident of the northern district of California, filed her bill in equity in the United States circuit court for the ninth circuit and district aforesaid against James Phelan, a citizen of the United States of America and a resident of said district, for the purpose of redeeming certain lands in said bill described from mortgages held thereon by the said James Phelan.

2. That thereafter said James Phelan interposed a demurrer to said bill for want of equity, which demurrer was sustained by said circuit court, and, the complainant de-

clining to amend, the bill was by order of the court dismissed. (47 Federal Reporter, 761–'5.)

3. That the complainant in said suit (the petitioner herein) thereupon took and perfected an appeal from said decree and judgment of the circuit court to the United States court of appeals for the ninth circuit, and subsequently the cause was heard by said court of appeals, and by its order and judgment the said decree of the circuit court was affirmed upon the ground that the complainant had been guilty of laches in the prosecution of her claims; that the circuit court determined the case upon the merits and not upon the ground of laches.

4. That at the time of the filing of said bill in equity and ever since it was and now is the law of the State of California that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him against the mortgagee in possession or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." (Section 346 of the Code of Civil Procedure of California.)

That it is also the law of the State of California that "if, when the cause of action accrues against a person, he is out of the State the action may be commenced within the term limited after his return to the State, and if after the cause of action accrues he departs from the State the time of his absence is not a part of the time limited for the commencement of the action." (Section 351 of the Code of Civil Procedure of California.)

That it appears affirmatively from said bill that the complainant's right to relief accrued on the 4th day of November, 1881; that between that date and the filing of the bill on the 16th day of September, 1890, the defendant, the said

James Phelan, had been absent from the State of California for a period aggregating four years, thus bringing the case within the time prescribed by said section 346 of the Code of Civil Procedure of said State.

For the interpretation and construction of the above-quoted provisions of the law of California the Court is respectfully referred to the cases of Hall *vs.* Arnott, 80 Cal., 355, 356, and Rogers *vs.* Hatch, 44 Cal., 280.

5. That the attention of said circuit court of appeals was directed to said provisions of the law of California both at the hearing of the case and subsequently by petition for rehearing; that notwithstanding the court held that, the cause being one in equity, the State statute of limitations had no application to the Federal courts, and that the latter courts would determine the question by a resort to "the inherent principles of their own jurisprudence," and, accordingly, that the doctrine of laches governed the case, and therefore and upon that ground the judgment of the circuit court was affirmed; that thereafter the said James Phelan died and said circuit court of appeals ordered that his personal representatives appear; and thereupon, their appearance having been made, the court ordered that they be substituted parties defendant in the place and stead of said James Phelan.

6. That on the 17th day of April, 1893, the circuit court of appeals denied the petition for a rehearing and ordered a stay of mandate for sixty days to afford this petitioner an opportunity to apply to this honorable Court for a writ of certiorari under the provisions of section six of the act of Congress creating the United States circuit court of appeals.

VIII.

The Question.

That the question which your petitioner now seeks to have determined on certiorari is whether a State statute of limitations applying expressly to a case in equity governs the courts of the United States when sitting in equity in a cause of equity cognizance and wherein the jurisdiction is concurrent with that of the State courts under the act of Congress of August 13, 1888, defining the jurisdiction of the circuit court of the United States in cases in equity where the controversy is between an alien and a citizen of the United States. (Supplement to Revised Statutes of the United States, page 611.)

8. That your petitioner is entitled to a determination of said question upon certiorari as being a question of gravity and importance in that in an important particular it involves the constitutional relation of the United States to the several States and the binding efficacy of the laws of the latter upon the courts of the former in matters properly within the province of State legislation and governing cases wherein the jurisdiction of the Federal courts is concurrent with that of the State courts.

Wherefore your petitioner prays that upon the basis of this petition and the certified copy of the record accompanying the same a writ of certiorari issue, directed to the United States circuit court of appeals for the ninth circuit, and that thereupon this honorable court dispose of the cause in conformity with the law of the land.

FRANCISCA L. DE MARTIN, *Petitioner.*

GEORGE D. COLLINS,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

This is to certify that I, George D. Collins, an attorney and counselor of the Supreme Court of the United States of America, have duly, carefully, and diligently examined the foregoing petition and that I believe it to be well founded in point of law and of fact, and have accordingly attested the same by my signature thereto.

In witness whereof I have hereunto set my hand this 24th day of April, 1893.

GEORGE D. COLLINS,
Counsel for Petitioner.

Office Supreme Court U. S.
FILED.
APR 26 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1333.

EX PARTE: IN THE MATTER OF FRANCESCA L. DE MARTIN, PETITIONER.

BRIEF FOR THE PETITIONER.

GEORGE D. COLLINS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1333.

IN RE APPLICATION OF FRANCESCA L. DE MARTIN FOR A WRIT OF CERTIORARI.

PETITIONER'S BRIEF.

I.

THE CASE.

This is an application for *certiorari* made upon notice and under the provisions of section six of the act of Congress creating the United States circuit court of appeals. On the 16th day of September, 1890, the petitioner, a citizen of Mexico, filed her bill in equity in the circuit court of the United States for the ninth circuit for the purpose of securing a decree against James Phelan, then a citizen of the United States, adjudging her entitled to redeem certain

lands situate in the State of California from certain mortgages held by the defendant. He appeared and demurred to the bill upon the grounds *inter alia* of laches and want of equity. The circuit court sustained the demurrer upon the ground of want of equity, and not upon the ground of laches (47 Federal Reporter, 761–'5). The complainant declining to amend, the bill was dismissed, and thereupon an appeal was taken to the circuit court of appeals for the ninth circuit. The latter court held it to be unnecessary for it to decide whether the bill presented an equity upon the merits of the case, being of the opinion that the right, if one existed, was barred by *laches*. The court's attention was directed to the fact that the bill had been filed within the time prescribed by the statute of limitations of California, and that therefore the doctrine of laches had no application to the case, but, notwithstanding, the court held that it was not governed by the law of the State, and was at liberty to apply the "inherent doctrines of its own system of jurisprudence and decide accordingly," referring to the cases of *Twin Lick Oil Company* vs. *Marbury*, 91 U. S., 592, and *Sullivan* vs. *Portland R. R. Co.*, 94 U. S., 811, in support of its ruling, and thereupon the judgment of the circuit court was affirmed. A petition for a rehearing was subsequently filed, in which it was urged that, as the jurisdiction of the court over the case was *concurrent* with that of the courts of the State, the State statute of limitations was obligatory, *proprio vigore*, upon the court, and should therefore govern its decision instead of the doctrine of laches. On the 17th of April, 1893, the court denied the petition for a rehearing, and now the complainant seeks to have the decision reviewed by the Supreme Court on *certiorari* and under and in pursuance of the provisions of section six of the act creating the United States circuit court of appeals.

II.

THE QUESTION.

The question presented by the petition for the writ is whether a State statute of limitations, applying expressly and exclusively to a case in equity, governs the courts of the United States when sitting in equity in a cause of equity cognizance such as is provided for by the State statute, and wherein the jurisdiction of the Federal courts is *concurrent* with that of the State courts under the act of Congress of August 13, 1888, defining the jurisdiction of the circuit court of the United States in cases in equity where the controversy is between an alien and a citizen. (Supplement to Revised Statutes of the United States, page 611.)

Before proceeding to discuss this question we desire to advert to the suggestion made by respondent's counsel when the motion for certiorari was presented that the petitioner had delayed her application for nearly a year after the judgment of the court of appeals was pronounced. While it is true that the judgment was given in July, 1892, yet a petition for a rehearing was filed within the proper time and was not denied until April 17, 1893, only a week prior to the application for certiorari. Of course the application for the writ could not have been made or entertained until the petition for a rehearing had been determined. There is no merit therefore in the respondent's suggestion.

III.

THE LAW.

The jurisdiction conferred by the Constitution upon the Federal courts over controversies between citizens of different States or between a citizen and an alien is necessarily *concurrent* with the jurisdiction inherent in the State courts,

and necessarily involves the administration and enforcement of the laws of the State to the extent that they apply to similar cases when brought in the State forum. The necessity which gives rise to this principle of constitutional law is too obvious to justify elaboration. It is true the Constitution does not state that the jurisdiction is concurrent, but it results, from the very nature of the fundamental law, that it must be so. The act of Congress of August 13, 1888 (Supplement to Revised Statutes of the United States, page 611), in defining the jurisdiction of the circuit court of the United States in cases in equity, where the controversy is between citizens of different States or citizen and alien, refers to such cases as being of "concurrent cognizance" with the State courts, and that is undoubtedly the correct interpretation of the Constitution. Now, the fact that the jurisdiction is concurrent carries with it the incidental obligation to exercise it according to the law of the State. If, therefore, the State statute of limitations would govern the case if it had been brought in a State court, it must govern the case when brought in the Federal courts. "Statutes of limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides or the property to be reached is situated are open during the prescribed period to the suitor" (*Brown* vs. *Hiatts*, 15 Wall., 184), and it must follow that where the period prescribed by the statute applies to any given case in equity the doctrine of laches is necessarily excluded. The pertinency of these general observations to this case is obvious. Here the State of California has a statute of limitations applying expressly and exclusively to suits to redeem lands from mortgage, and that statute provides: "An action to redeem a mortgage of real property with or without an account of rents and profits may be brought by the mortgagor or those claiming under him against the mortgagee in possession or those claiming under him, unless he or they

have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage" (section 346 of the Code of Civil Procedure of California). This provision has been interpreted by the supreme court of California in the case of *Hall* vs. *Arnott*, 80 Cal., 355, 356. It is also a provision of the State statute that, "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not a part of the time limited for the commencement of the action" (section 351 of the Code of Civil Procedure of California). This provision is also given an authoritative construction by the supreme court of the State in the case of *Rogers* vs. *Hatch*, 44 Cal., 280. Under the law of California, therefore, the bill in equity filed by petitioner was not barred by the statute of limitations, and, as that statute governs the case, the doctrine of laches has absolutely no application whatever. It was held in *Cross* vs. *Allen*, 141 U. S., 537, that "so long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce those demands." It is very manifest, therefore, that the court of appeals erred in refusing to apply the State statute of limitations and in resorting to the doctrine of laches in its stead; nor do the cases cited by it give the least countenance to its views. The case of *Twin Lick Oil Company* vs. *Marbury*, 91 U. S., 592, originated in the District of Columbia, and the very existence of a State statute of limitations was thereby excluded and the question of concurrent jurisdiction over controversies in equity between a citizen and an alien did not and could not arise. The case simply decides that in suits wherein the jurisdiction in equity is exclusive of that of courts of law the doctrine of laches applies if there is no statute of limitations expressly governing the case; or, as said in *Godden*

vs. *Kimmel*, 9 Otto, 201, "there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case." Implying, of course, that where there is such a statute it must control. The case of *Sullivan* vs. *Portland R. R. Co.*, 94 U. S., 811, expressly states that the statute of limitations was not before the court because not properly plead, and therefore the court was forced to apply the doctrine of laches, there being no other limitation.

Some confusion arose in the court below relative to the matter of concurrent jurisdiction, it being inadvertently spoken of as that jurisdiction prevalent in courts of equity which also existed in courts of law, whereas the concurrent jurisdiction involved in this case is that pertaining to the judicial power exercised in a certain class of cases wherein the State and Federal courts possess the same jurisdiction. The difference is important: the one relates to general jurisprudence, and therefore not of sufficient gravity or importance to furnish the basis of an application for a writ of certiorari; the other pertains to the constitutional relations existing between the National and State Governments, and is, therefore, of sufficient importance to require the issuance of the writ.

We have refrained from making it a point in the case that in chancery, independently of a statute of limitations, the time prescribed within which a redemption from a mortgage might be made is twenty years after the right accrues (*Hughes* vs. *Edwards*, 9 Wheat., 497), and upon that ground the judgment of the court of appeals is erroneous; but, as that question pertains to general jurisprudence, we are satisfied that it cannot be reached by *certiorari*, and therefore do not present it.

In conclusion, it is to be noted that what has been stated in this brief was not intended to have nor has it any application to that portion of section 2 of article III of the Constitution which provides that "the judicial power shall

extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority." In such cases the Federal courts exercise an independent jurisdiction, necessarily resulting from the supremacy of the General Government, and in no proper sense can such a jurisdiction be said to be concurrent with the courts of the States. It is in its nature exclusive, and therefore the laws of the State do not, because they cannot, apply to such cases; but this case is not one of those cases; on the contrary, it is of that other class mentioned in section 2 of article III, wherein the Federal judiciary is given jurisdiction of controversies between citizens of different States and between a citizen and an alien, cases where the jurisdiction is necessarily concurrent with the State court, and where it is the duty of the Federal courts, therefore, to administer and enforce the State law.

It is respectfully submitted that the application for the writ should be granted.

GEORGE D. COLLINS,
Counsel for Petitioner.

Office Supreme Court U. S.
FILED.
APR 28 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1892.

Ex Parte
FRANCISCA L. DE MARTIN
Petitioner.

No. 1333.
Original.

PETITION FOR CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

W. A. Day,
W. P. Montague,
Attorneys for Respondent.

Supreme Court of the United States.

October Term, 1892.

Ex Parte
FRANCISCA L. DE MARTIN
Petitioner.

No. 1333.
Original.

PETITION FOR CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

The petition for a writ of *certiorari* to be directed to the Circuit Court of Appeals under the provisions of section six of the Act of March 3, 1891, is addressed to the discretion of this court; and the court has laid down the rules by which it will be governed in granting or refusing writs of *certiorari* under that act.

In the case of *Lau Ow Bew*, 141 U. S., 583, the Court said:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly worked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this Court to issue the writ applied for * * * ."

Two elements must then concur in a case to justify the issue of this writ. *First*, the matter must be "of sufficient importance in itself"; and *Second*, it must be sufficiently open to controversy. The petitioner's case is defective in both these respects.

I.

The decision in *Lau Ow Bew* is a good illustration of the kind of case which the Court considered of sufficient importance to justify review upon a writ of *certiorari*. The disposition of that case involved the application of the Chinese restriction acts to Chinese merchants domiciled in the United States, in the light of the treaties between the Government of the United States and that of China. The question involved in that case was undoubtedly one of great gravity; on the decision that should be arrived at depended the status and the liberties of a large number of persons and it was, as the Court said, "a matter of international concern." The gravity and importance which must belong to a case to warrant the exercise of this extraordinary process for review should be estimated by the number of persons and the magnitude of the interests to be affected by the decision. It is not enough that an interesting point of law is to be decided; it must be a point the decision of which will be far reaching in its effects; otherwise, this Court would be flooded with applications to review cases which the act establishing the Circuit Courts of Appeals aimed to have finally disposed of in those courts to the end that this Court might be relieved. Not only

would the main purpose of that act be defeated, but the establishment of those courts would result in great injury and cause unnecessary delay and expense to litigants because a system of double appeal would be created where before one only existed. The present case is a bill to redeem real estate from a mortgage, and the case has no peculiar importance or interest except for the parties. Moreover, the application for the writ is based not upon the decision of the Court of Appeals, but upon the reasons by which that Court supported its decision. It is submitted that this is not enough.

II.

But not only is this case not one of public interest, but also the point involved is not open to controversy.

Both the Circuit Court and the Circuit Court of Appeals reached the same conclusion, namely, that the bill was demurrable for want of equity. The court of first instance decided that the complainant had never had an equitable case; the Court of Appeals, without expressly deciding that point, decided that whether or not she ever had had such a case, she did not have it at the time her bill was filed.

The petitioner's contention that because the State statute of limitations has not run out, her right, supposing a right once existed, cannot be lost by delay, proceeds upon a misconception of the nature and purpose of statutes of limitations. Such statutes fix a time beyond which a defendant has a right (which he may exercise or not as he pleases) to refuse to be called to account for his doings in the matter in controversy. Until that time elapses the statute is ~~in operation~~ inoperative. The time fixed is an outside limit. There is no implication in such a statute that in a case in equity, or in a case at law where equitable defenses are admissible, a bar may not arise within that time.

The State of California fixes a limit of time beyond which its courts will not enforce a remedy for an alleged wrong against the will of a defendant.

It may well be doubted whether such a statute has the effect,

even in the State courts, of destroying the discretion of a court of equity to dismiss stale claims. While a defendant has in the State courts a right to invoke the protection of the statue in any case to which it is applicable, it by no means follows that a plaintiff may maintain his bill in equity as of right in all cases where the statutory time has not expired, notwithstanding that he may have been guilty of laches in fact whereby the rights of others have been prejudiced. However this may be, the federal courts retain the right to regulate their own procedure and to refuse, as the Court of Appeals has done, to entertain a case in which it adjudges that the complainant has by delay lost any equitable right which he may have had. and the court may do this without deciding whether or not such right ever existed.

Statutes of limitations relate to the remedy and not to the right; they are statutes regulating procedure and are parts of the *lex fori*. On the other hand the doctrine of laches in equity goes to the right, and laches as ground for dismissal of a bill in equity stands on a very different footing from a statutory bar in a case at law. In equity diligence is of the essence of the matter; laches destroys the equity, and a bill dismissed for laches is a bill dismissed for want of present equity. A general demurrer may be sustained on the ground that laches is apparent upon the face of the bill, but a general demurrer to a declaration at law cannot be sustained on the ground that the declaration discloses that the claim is barred by a statute of limitations. The statute must be pleaded.

It is rare to admit this defense in equity, in a plain case, solely on the ground of lapse of time. It almost always rests on the ground that some one has been prejudiced by the delay, that the situation of the parties has changed, and perhaps cannot be restored, or at least that the complainant's delay and silence amount to acquiescence in or affirmance of the acts complained of. For this reason, in some cases a very short delay may make the defense available, and in others the time elapsed may have been more than enough to constitute a bar at law in a similar case, and yet, if no one has been prejudiced, a court of equity may entertain the case.

In support of this position we cite:—

Galliher *vs.* Cadwell, 145 U. S., 368.
Hayward *vs.* Elliott Nat. Bank, 96 U. S., 611.
McKnight *vs.* Taylor, 1 Howard, 161.

This State statute of limitations cannot therefore restrict the right of a court of equity to decide whether the facts existing at the time of filing the bill constitute an equitable case. Still less can such a statute affect the courts of an independent jurisdiction. On the subject of equity jurisdiction of the Federal courts, reference is made to—

Paine *vs.* Hook, 7 Wallace, 425.
Fitch *vs.* Creighton, 24 Howard, 159.
Noonan *vs.* Braley, 2 Black, 499.

III.

Finally, the right claimed in this case is to have a deed of sale of a certain piece of land by the mortgagor to the morgagee (which, it is admitted, was intended as such by both parties at the time it was made) rescinded on the ground of constructive fraud, and the instrument declared a mortgage. It is not enough for maintaining the suit, that the complainant had at one time a right to have the sale avoided, but that right must have been exercised before it expired by limitation or laches, and the instrument must have been declared a mortgage, in order to bring the case within the sections in the California code relating to the time allowed for the redemption of mortgages. A sale of the above character (assuming that the fact of constructive fraud is established) being at most voidable and not void, is capable of ratification by the injured party. If fraud existed in this case the complainant had an election to affirm the sale and abide by it; or to have it set aside, in which case the instrument might or might not be declared a mortgage. It could not become a mortgage until the sale was rescinded, and not even then necessarily. The equity was to have the sale set aside, and whether the deed should be absolutely rescinded, or declared a mortgage,

concerns merely the form of relief that equity would apply. In any case the exercise of the election by the injured party was a condition precedent to the instrument's becoming a mortgage. As the complainant did not, in this instance, begin suit to have the sale rescinded until laches had clearly barred the right of rescission (see rule laid down in *Grymes vs. Sanders* 93 U. S., 55, relative to rescinding a contract on the ground of fraud; also Sect. 343 of the California Code and Civil Procedure, which fixes four years as the limit of time for bringing suits in all cases not otherwise provided for), and the time for exercising an election had expired, the character of a mortgage was never impressed on the deed, and it never became such in fact. The sections of the California Code relating to the time within which a bill may be brought for the redemption of a mortgage, namely, sections 346 and 351, on which the complainant relies, have, therefore, no application, but the case is governed by Sect. 343 of the Code previously referred to, and by the familiar rule of equity regarding laches in bringing a suit for the rescission of a contract of sale on the ground of fraud.

The record now before the court shows that substantial justice has already been awarded to the parties and the further action asked for in the complainant's petition should be denied.

W. A. DAY,

W. P. MONTAGUE,

Attorneys for Respondent, and of Counsel.

149 U.S. 772

Supreme Court, U.S.
FILED
OCT 26 1891
JAMES H. MCKENNEY
CLERK

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1889.

East Tenn., Va. & Ga. Railroad Co.,
Plaintiff in Error,

VS.

C. D. McKemy, Defendant in Error.

Argument for Plaintiff in Error.

WM. M. BAXTER,
Solicitor for Plaintiff in Error.

S. B. NEWMAN & CO., PRINT, KNOXVILLE.